



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED IN PART: January 6, 2011

CBCA 340

NATIONAL HOUSING GROUP, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

Sean A. Roberts of The Roberts Law Firm, Houston, TX, counsel for Appellant.

Doris S. Finnerman, Perrin N. Wright, and Janette M. Hays, Office of General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **DRUMMOND**, and **KULLBERG**.

KULLBERG, Board Judge.

Appellant, National Housing Group, Inc. (NHG), appealed the decision of the contracting officer (CO) for the Department of Housing and Urban Development (HUD) that denied NHG's March 31, 2005, claim in the amount of \$8,429,188.40 and asserted a claim against NHG in the amount of \$162,327. NHG claimed costs incurred as a result of HUD not ordering the required minimum under an indefinite quantity (IDIQ) contract. This appeal was originally filed at the HUD Board of Contract Appeals. On January 6, 2007, the Civilian Board of Contract Appeals (CBCA) was established, and this appeal was docketed as

CBCA 340 and consolidated with NHG's other appeal, CBCA 341. HUD subsequently moved for summary relief. The Board granted HUD's motion with regard to CBCA 341 and denied that appeal but denied its motion with regard to CBCA 340. *National Housing Group, Inc. v. Department of Housing and Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043.

A hearing in this appeal was held from March 22 to 25, 2010. Both parties submitted briefs.

Background

On December 31, 2002, HUD's contracting officer awarded contract C-OPC-22376 (contract 376) to NHG for "property management services for property (ies) in the inventory of the Atlanta Multifamily Property Disposition (MFPD) Center." Exhibit 2.1 at B-1.¹ A multifamily property was defined "as 5 or more units of residential housing." *Id.* at C-4. Properties to be assigned under contract 376 by the Atlanta MFPD Center were located in geographic area 2.² *Id.* at B-1. The contract performance period included a base period of two years and three option years. *Id.* at B-4. The properties to be assigned could "be either HUD-owned, where HUD has title, or Mortgagee-in-Possession (MIP), where HUD does not have title but as mortgagee has taken over management and operation." *Id.* at B-2.

The contract incorporated in full text the following Federal Acquisition Regulation (FAR) clauses: 48 CFR 52.216-18 (2001) (FAR 52.216-18), Ordering (Oct. 1995); FAR 52.216-19, Order Limitations (Oct. 1995); FAR 52.216-22, Indefinite Quantity (Oct. 1995); FAR 52.217-8, Option to Extend Services (Nov. 1999); and FAR 52.217-9, Option to Extend the Term of the Contract (Mar. 2000). Exhibit 2.1 at I-3 to -4. The contract also stated the following:

This is an Indefinite-Quantity contract as defined at Subpart 16.504 of the Federal Acquisition Regulation (FAR) and in

¹ All exhibits are found in the appeal file, unless otherwise noted.

² Geographic area 2 was divided into geographic area 2(a), which included Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee, and geographic area 2(b), which included the Commonwealth of Puerto Rico and the U.S. Virgin Islands. Exhibit 2.1 at B-1. Three other contracts, C-OPC-22253 (geographic area 1), C-OPC-22377 (geographic area 3), and C-OPC-22378 (geographic area 4), were also awarded on December 31, 2002, to NHG under the same solicitation, R-OPC-22253. *National Housing Group*, 09-1 BCA at 168,371.

Section I, Clause FAR 52.216, Indefinite-Quantity, herein. A Firm Fixed Unit Price contract will be awarded. Services provided by the Property Manager (PM) under this contract shall be secured by issuance of orders placed in accordance with item G.7, Ordering Procedures and Section I, Clauses FAR 52.216-18, Ordering[,], and FAR 52.216-19, Order Limitations[,], and the clause “Ordering Procedures[.]”

Id. at B-1. FAR 52.216-22(d), which was at section I.4 of the contract, provided the following:

Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor’s and Government’s rights and obligations with respect to that order to the same extent as if the order were competed during the contract’s effective period; *provided*, that the contractor shall not be required to make any deliveries under this contract after the time specified in the applicable order(s) in effect at the time of the expiration of the ordering period.

Id. at I-4. FAR 52.217-9, which was at section I.6 of the contract, provided that “[t]he Government may extend the term of this contract within 30 days of contract expiration; provided that the Government gives the Contractor a preliminary notice of its intent to extend at least 60 days before the contract expires.” *Id.* at I-5.

With regard to assignments of property, contract 376 provided that the “Government shall order a minimum quantity of 12 properties to be managed during the base year of this contract, and a minimum of 12 during each option year period, if exercised.” Exhibit 2.1 at B-1. The contract also stated, “HUD is under no obligation to assign properties exceeding the minimum quantity specified. Properties may be removed from the PM’s inventory at any time by issuance of a modification to the task order that assigned the property to the PM.” *Id.* at B-2.

For each multifamily property to be assigned, the contractor was to be paid a monthly price per unit, which was set forth in a schedule proposed by the contractor. Exhibit 2.1 at B-4 to -7. The monthly management fee for a multifamily property was computed by multiplying its unit price times the number of units within that property. *Id.* at G-1. The different types of multifamily properties that could be assigned under contract 376 included

residential housing, retirement service centers, nursing homes, assisted living facilities, hospitals, mobile home parks, vacant land, off-line (unfit for occupancy) properties, and commercial space. *Id.* at B-4 to -7. With regard to payments for management of properties, the contract stated the following:

For each property assigned under this contract, HUD shall pay the PM the monthly management fees set forth herein as full compensation for work required, performed and accepted, as further described in section C. The management fee shall not include the costs of operation, repair or maintenance, as described in Section C, which are considered to be property expenses.

Id. at B-2. The monthly unit price for the management of a property, consequently, did not include payroll costs of the property manager and other staff because HUD reimbursed those costs separately. Transcript at 451-54, 478. A separate item of work under the contract apart from the assignment of multifamily properties was tenant relocation services, and there was no guaranteed minimum for such services. Exhibit 2.1 at C-32; Transcript at 444-45. Travel expenses related to performing the contract were reimbursable as a separate cost item. Exhibit 2.1 at B-8.

The contract required that a PM service center be established.³ Exhibit 2.1 at C-35. The service center was established for the entire geographic area, and the contract required that it be in operation regardless of the number of properties assigned. *Id.* The service center staff were not to perform tasks for which the PM received a management fee. *Id.* The cost of operating the PM service center, including payroll and other costs, was the contractor's responsibility. Transcript at 478. The contractor was required to operate a service center for the geographic area even if no properties were assigned. *Id.* at 501. The cost of operating a service center had to be paid out of the management fees received. *Id.* at 503.

In order to determine the unit prices that NHG would be paid under the contract, Ms. Wynee Joyner, one of NHG's officers, relied upon historical information contained in attachments 9 and 11 of the solicitation. Transcript at 71-73. Attachment 9 of the solicitation indicated that as of June 30, 2002, there were twelve multifamily properties in the predecessor contractor's inventory. Exhibit 2.1 at 96. Attachment 11 was a "pipeline

³ At various times during contract performance, the service center location was in Landover, Maryland; Atlanta, Georgia; and Charlotte, North Carolina. Exhibit 3.1 at 7-8; Transcript at 239-40.

report” that provided information as to the number of units in a property and when that property was acquired by HUD. *Id.* at 98-113.

Ms. Joyner testified that she expected NHG to earn a profit of ten to fifteen percent. Transcript at 120. Initially, Ms. Joyner determined that the unit price should be \$193. *Id.* at 124-25. That amount was based upon the assignment of ten multifamily properties with a combined total of 1000 units. *Id.* at 126. She then computed a lower unit price of \$33 by assuming the assignment of twenty to thirty-two properties with a combined total of 5000 units. *Id.* at 128.

NHG’s base period unit price for occupied residential properties within the United States was \$29 for properties with five to one hundred units and \$28 for properties with more than one hundred units. Exhibit 2.1 at B-4. The unit prices for other types of occupied properties, including properties in the Commonwealth of Puerto Rico and the U.S. Virgin Islands, varied from \$28 to \$35. *Id.* at B-4 to -7. Unit prices for unoccupied and off-line properties varied from \$10 to \$12. *Id.*

HUD only assigned six multifamily properties⁴ during the base period of the contract, which ended on December 31, 2004. Exhibits 2.2-3.2. The six assigned properties had a combined total of 713 units. Exhibit 3.2. HUD unilaterally extended NHG’s management of one property, Waterford Place Apartments, until September 30, 2005, and NHG and HUD executed a bilateral modification that compensated NHG for that period of extended performance. Exhibit 2.23. Under that modification, HUD and NHG agreed to a higher monthly unit price of \$51.20 for occupied units and \$46.20 for unoccupied units. *Id.* That modification also contained a statement of release in which NHG released “the Government from any and all liability under this contract for further equitable adjustment attributed to the unilateral extension of Contract C-OPC-2253, Task Order 0010, Modification #3.” *Id.* NHG received management fees for the six assigned properties that totaled \$118,660.99, which included the extended period of performance for Waterford Place Apartments. Exhibit 12.

On March 31, 2005, NHG submitted to HUD a claim in the amount of \$8,429,188.40 under contract 376. Exhibit 1.2 at 4. NHG sought to recover its “nonrecurring costs/start up expenses, lost profits[,] and other business opportunities [losses] caused by HUD’s decision to order fewer services than the guaranteed minimum and other actions and omissions”

⁴ Those properties included the following: Stonegate Village (136 units), Shelby Manor Health Care (153 units), Broadmeadow Apartments (60 units), Twin Oaks Assisted Living (61 units), St. Thomas Square Apartments (33 units), and Waterford Place Apartments (270 units). Exhibit 3.2.

Id. at 5. NHG computed its claim for expected management fees on six more properties by multiplying \$28, the monthly unit price; times six, the number of properties; times 9242, the total number of units⁵ in the six properties; times twenty-four, the number of months in the base period. *Id.* at 19. The additional management fees that NHG sought, consequently, totaled \$6,210,624. *Id.* Also, NHG's claim sought a profit of ten percent on the additional management fees and \$1,597,502 for "change of scope." *Id.*

On April 5, 2005, NHG and HUD's CO executed a "Supplemental Agreement and Partial Settlement of Breach of Contract Claims" (preliminary settlement), which provided for payment in the amount of \$427,800 to NHG. Exhibit 1.3. The preliminary settlement agreement stated the following in pertinent part:

7. The parties have reached a partial settlement agreement in the amount of \$427,800, which the parties agree is a fair and reasonable settlement of the breach of contract claim with respect to contract C-OPC-22376, pending the final examination of NHG's cost proposal and receipt of the formal audit determination.

8. In consideration of the foregoing, NHG agrees to allow a formal audit of its claim and waives any right to the payment of interest under the Contract Dispute[s] Act on any portion of the claim associated with not meeting the guaranteed minimum for contract C-OPC-22376. NHG further agrees that, based upon the receipt of audit determinations and final analysis of NHG's cost proposal, the Contracting Officer shall revisit this settlement amount and shall recover any overpayment that the Department determines is due and owing by any remedies available to the Department, including set-off against any contracts that NHG holds with the Department or any other federal agency. As further consideration for the Department's payment of \$427,800, NHG waives any future claims against the Government in connection with the guaranteed minimums in

⁵ NHG's claim referenced the following properties: Coventry Apartments (4690 units), Woods Apartments (2160 units), County Oaks Apartments (654 units), Hialeah Housing (544 units), Double Oaks Apartments (570 units), and Americana Apartment (624 units). Exhibit 1.2 at 19.

contracts C-OPC-22253, C-OPC-22376, C-OPC-22377, and C-OPC-22378.

9. The parties agree to work in good faith to resolve this dispute amicably through full negotiations and final settlement after the results of the audit findings, and the contract terms and conditions.

10. Nothing contained herein shall be construed as a waiver of NHG's right to contest the audit findings in connection with the March 30, 2005 claim under Contract C-OPC-22376, or any contracting officer's final decision resulting therefrom, or NHG's right to appeal such decisions to the appropriate Board of Contract Appeals.

Id. On April 6, 2005, HUD paid NHG \$427,800. Exhibit 10; Transcript at 307. A spreadsheet⁶ attached to the preliminary settlement agreement showed that the settlement amount of \$427,800 was computed by multiplying \$50, the monthly unit price; times 713, the combined total number of units; times twelve, the number of months that a property would have been assigned. Exhibit 1.3 at 3. No contract modification related to the settlement agreement or the payment was executed by the parties, but an unsigned contract modification was prepared that indicated the amount of NHG's claim and the commitment of the parties to work together in good faith to settle the claim. Exhibit 11; Transcript at 305.

Subsequent to executing the preliminary settlement agreement, the Defense Contract Audit Agency (DCAA) issued on August 19, 2005, its audit report regarding NHG's March 31, 2005, claim under contract 376. Appeal File, Exhibit 3.1. The audit report noted the following:

The contractor's initial summary of the incurred cost for this contract during the base period indicated a net amount of \$1,646,299. Based upon our initial meeting with the contractor representatives, discussions about the basis of the summary, and our requests for information, the contractor began providing revisions to the initial summary. The final revision indicated a net amount of \$505,089, a significant reduction from the

⁶ Ms. Joyner, testified that the spreadsheet appeared to have been prepared by someone at NHG, but she could not name the individual. Transcript at 303.

original summary. We have evaluated the revised summary to the extent possible under the circumstances. In addition, we noted the revised summary of incurred cost includes significant costs during periods when no properties were assigned for management, especially in CY 2004.

Id. at 3. The audit report adjusted NHG's costs further downward to \$269,307. *Id.* at 5. The report also noted that NHG did not "maintain a job cost accounting system to capture direct cost[s] for specific projects." *Id.* at 10.

The CO's decision, which was dated June 6, 2006, denied NHG's March 31, 2005, claim. Exhibit 1.1. The CO also found that the payment of \$427,800 under the preliminary settlement agreement dated April 5, 2005, was excessive. *Id.* at 8. In her decision, the CO determined that HUD and NHG had failed to reach an agreement as to the amount of compensation owed as a result of HUD assigning less than the required minimum number of properties under the contract. *Id.* at 2. While agreeing with NHG's method for developing its claim, the CO disagreed "with all the factors used to calculate the amount due except for the number of properties and the unit price per month per unit set forth in the contract."⁷ *Id.* The CO calculated NHG's damages based upon "historical trends for HUD's Property Disposition Inventory . . . using the data derived from the historical information with the largest number of properties managed over the longest period of time." *Id.* at 4. The CO relied on seven years of data for forty-six properties. *Id.* at 5. In her calculation, the CO multiplied six, the number of properties; times 113, the average number of units in each property; times 14.3, the average number of months that a property was managed; times \$28, the monthly unit price, which equaled \$271,471. *Id.* at 3. From \$271,471, the CO deducted \$7998, which were the costs of travel that the CO assumed NHG would have incurred for managing an additional six properties. *Id.* at 7. The CO's decision determined that the proper compensation for HUD's failure to assign the required minimum number of properties under contract 376 should have been \$263,473. *Id.* at 8. That amount was then deducted from the previous preliminary settlement payment of \$427,800, and the CO determined that NHG was in debt to HUD in the amount of \$164,327, which NHG was directed to repay in thirty days. *Id.* at 8. NHG timely appealed the CO's decision.

⁷ The CO's decision noted that NHG's claim of \$6,831,686.40 for management fees on six properties that were not assigned was based on overstated numbers of units in two of the properties. Exhibit 1.1 at 4. NHG's claim asserted that Coventry Apartments had 4690 units and that Woods Apartments had 2160 units, but the contracting officer contended that there were only 645 units in Coventry Apartments and 216 units in Woods Apartments. *Id.*

The parties have stipulated that NHG is entitled to damages for breach, but the amount of quantum is disputed. Exhibit 8. Both parties employed private consultants to compute the amount of damages that NHG should be paid because HUD assigned six fewer properties than the required minimum of twelve properties. Exhibits 4-7. The consultants used similar methods to compute the additional management fees that NHG would have collected if the required minimum number of properties had been assigned. Exhibit 4 at 5. Generally, the method used by the consultants was the multiplication of the number of multifamily properties to be assigned, times the number of units in the property, times the number of months the property would have been held in NHG's inventory, times the monthly unit price. *Id.* In order to determine the number of units in a multifamily property and the number of months a property would have been in NHG's inventory for the purpose of calculating damages, both consultants used data from the predecessor contract. *Id.* at 16-17.

NHG's consultant, Mr. Dwight Battle, determined that damages for breach of contract 376 totaled \$1,591,000. Exhibit 7 at 3. Mr. Battle calculated that amount by first multiplying twelve, the number of properties assigned; times 123.75, the number of units in each property; times fifteen, the number of months a property would have been managed; times \$63, the monthly unit price. *Id.* at 8. Multiplying those factors together equaled a minimum contract value of \$1,403,325. *Id.* The \$63 unit price, which was larger than any unit price proposed by NHG, was based on Mr. Battle's determination that the unit price for the assignment of twelve properties should be the sum of \$28 plus a \$35 readiness premium.⁸ *Id.* The factors Mr. Battle used for the number of units and number of months for holding properties were not based on averages, but rather, those figures were calculated at the seventy-fifth percentile of the range of historical data. *Id.* at 7. Mr. Battle also determined that NHG's damages included a reinvestment income of \$535,250, which was due to the loss of earnings from future contracts; a loan amount of \$172,250; and a loan carrying cost of \$63,411. *Id.* at 9. Mr. Battle's calculation of damages deducted the amount of management fees paid by HUD, which he determined was \$155,511⁹, and the amount of the preliminary settlement, \$427,800. *Id.*

⁸ Mr. Battle's analysis also included calculations in which the readiness premium was reduced, but the number of properties was increased such that the amount of damages remained the same. Exhibit 7 at 8. With the assignment of more than twelve properties, the readiness premium would be reduced, and the readiness premium would be reduced to zero if twenty-seven properties were assigned. *Id.*

⁹ The Board, however, finds \$118,660.99 to be the correct amount of management fees paid to NHG because that amount is supported by HUD's cash disbursements data. Exhibit 12. There is no similar supporting data for the amount used by Mr. Battle.

At the hearing, Mr. Battle acknowledged that including the loan amount of \$172,250 may have been “double counting,” and he removed that item from his computation of damages. Transcript at 365. Mr. Battle testified that his computation of damages was based upon his determination that HUD’s minimum obligation under contract 376 was to purchase \$1.4 million in services. *Id.* at 394. Also, Mr. Battle acknowledged that his analysis did not include the costs that NHG would have incurred to perform a \$1.4 million contract, and he also indicated that NHG’s profit rate was ten percent. *Id.* at 402-05.

HUD’s consultant, Mr. Todd K. Lester, wrote his report in response to the report prepared by NHG’s consultant, Mr. Battle. Exhibit 4 at 1. Mr. Lester deemed unreasonable Mr. Battle’s calculation of a minimum contract value, which was based upon twelve properties and a \$63 monthly unit price. *Id.* at 4. Instead, Mr. Lester’s computation used six properties and a unit price of \$28. *Id.* at 5. Also, Mr. Lester disagreed with Mr. Battle’s use of the seventy-fifth percentile to compute the number of units within a property and the number of months that a property would have been managed. *Id.* at 4. In contrast, Mr. Lester averaged the number of units, which was 105, and the number of months, which was ten. *Id.* at 5. The averages for numbers of units and months were based upon Mr. Lester’s analysis of data from the predecessor contract over a two-year period. Transcript at 765-66, 793-94.

Mr. Lester’s computation of management fees for six properties was \$176,400, and he added to that amount a loan carrying cost of \$8571 for a total claimed loss in the amount of \$184,971. Exhibit 4 at 4. Although he allowed a portion of the loan carrying cost in his analysis, Mr. Lester determined that the loan carrying cost claimed by NHG lacked support, and the payment of the preliminary settlement should have been sufficient to pay the amount of the loan.¹⁰ *Id.* Additionally, Mr. Lester excluded from his calculation of damages the loan amount of \$172,250 and the lost reinvestment income of \$535,250 that Mr. Battle used in his calculation of damages. *Id.* Mr. Lester determined that the claim for the loan amount was “double counting” and the claim for reinvestment income on future contracts was speculative. *Id.* Since Mr. Lester’s calculation of breach damages, \$184,971, was less than the amount HUD paid under the preliminary settlement agreement, \$427,800, he determined that NHG was not entitled to any additional damages. *Id.* Mr. Lester acknowledged that his calculation was based upon what NHG could have reasonably expected if the additional six properties had been assigned. Transcript at 906.

¹⁰ Mr. Lester computed interest based upon the period of time between when NHG submitted its claim and payment of the preliminary settlement of \$427,800. Exhibit 4 at 21.

NHG submitted before the hearing a schedule of costs, which showed costs that totaled \$1,118,822. Exhibit 9. NHG's schedule of costs totaled more than the revised summary, \$505,089, which NHG provided during the DCAA audit. Exhibits 3.1, 9. NHG's schedule of costs had no supporting data for the asserted costs. Exhibit 9.

Discussion

In the Board's previous decision, we stated that the "only triable issues that remain before the Board are entitlement and quantum under CBCA 340 due to HUD's assignment of only six of the required minimum number of twelve properties under contract 376." *National Housing Group, Inc.*, 09-1 BCA at 168,380. HUD does not deny that only six properties were assigned and that contract 376 required that it assign a minimum of twelve properties. Both parties agree that any award of damages should be reduced by the amount of the preliminary settlement payment of \$427,800. The Government contends that the preliminary settlement payment exceeds the amount of management fees that would have been collected had an additional six properties been assigned. NHG contends that its damages range from "\$1,800,000 and \$2,000,000 under principles of law and equity." Appellant's Brief at 26. For the reasons stated below, we find that the preliminary settlement amount of \$427,800 exceeds any reasonable measure of damages based upon the record before us. The Board consequently denies this appeal as to allowing any recovery of damages in excess of the \$427,800 already paid. The second issue before the Board is HUD's claim of \$164,327, which was asserted in the CO's June 6, 2006, decision. The Board finds that HUD improperly asserted its claim to recover a portion of the preliminary settlement of \$427,800 and grants only that portion of this appeal.

It has been established that where the Government fails to order the guaranteed minimum under an IDIQ contract, the contractor is "entitled to recover the amount it lost as a result of that contract breach—no more and no less." *White v. Delta Construction International, Inc.*, 285 F.3d 1040, 1045 (Fed. Cir. 2002). The purpose of "damages for breach of contract is to place the non-breaching party 'in as good a position pecuniarily as he would have been by performance of the contract.'" *Id.* at 1043 (quoting *Miller v. Robertson*, 266 U.S. 243, 257 (1924)). Under such circumstances, however, "the non-breaching party is 'not entitled to be put in a better position by the recovery than if the [other party] had fully performed the contract.'" *Id.* (quoting *Miller*, 266 U.S. at 260).

NHG argues that it "suffered both out-of-pocket losses and lost profits as a result of HUD's breach." Appellant's Brief at 21. The following has been recognized with regard to the types of damages recoverable in the case of a breach of contract:

Expectation interest damages and reliance interest damages are available as alternative forms of recovery. Expectation interest damages give a non-breaching party the benefit of the bargain by placing it in as good a position as it would have occupied if the breaching party had performed the contract. Expectation interest damages can include profits. Reliance damages include expenditures the non-breaching party made in performance or in anticipation of performance of the contract that was breached. Reliance interest damages reimburse the non-breaching party for the loss caused by its reliance upon the contract by placing the party in as a good a position as it would have occupied if the contract had never been made. Reliance interest damages do not include profits.

Western Aviation Maintenance, Inc. v. General Services Administration, GSBCA 14165, 00-2 BCA ¶ 31,123, at 153,740. NHG, consequently, cannot recover both expectation interest and reliance interest damages. Under either alternative measure of damages, however, the Board does not find that NHG has shown that the measure of damages in this appeal exceeds the \$427,800 that HUD has already paid under the preliminary settlement agreement, and, consequently, the payment of additional damages is not justified.¹¹

Both NHG and HUD have offered calculations of the amount of management fees that NHG would have collected but for the breach, which would be NHG's expectation interest damages. The following has been recognized with regard to the measure of damages:

There is sufficient content to the contracts to permit the determination of an appropriate remedy. "If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery," and the board's duty is to "make a fair and reasonable approximation of the damages." *Locke [v. United States]*, 283 F.2d [521,] 524 [(1960)]. The relevant factors in determining the value of a chance for obtaining business include: the total amount of business the plaintiff would have been eligible for; any material

¹¹ NHG's brief contends that the measure of damages should consider "what 'full performance' is when HUD is acting in good faith." Appellant's Brief at 25. The Board's previous decision dealt with and rejected NHG's argument that HUD had acted in bad faith. *National Housing Group, Inc.*, 09-1 BCA at 168,379.

facts that would have tended to prevent the plaintiff from receiving his proportionate share of such business; and the average expenses incurred in fulfilling the obligations of the contract.

Ace-Federal Reporters, Inc. v. Barram, 226 F.3d 1329, 1333 (Fed. Cir. 2000).

In this case, HUD has offered the more reasonable approach in attempting to approximate the amount of management fees that NHG would have earned if the additional six properties had been assigned. Mr. Lester's calculation of the amount of management fees that NHG could have collected was based upon data from the preceding contract that enabled him to compute an average number of units in each property and an average number of months that a property would have been managed by NHG. Mr. Lester's measure of damages, \$176,400, is less than the amount of the preliminary settlement.

NHG, in contrast, has unreasonably argued for damages that are in excess of one and a half million dollars. Mr. Battle's method for computing damages rests on calculating the value of NHG's contract with a unit price of \$63, which far exceeded any unit price in NHG's contract. The Board finds that Mr. Battle's analysis attempts to establish an unreasonably high contract value by adding a readiness premium to increase NHG's unit price to more than double those prices in contract 376. The method for computing damages proposed by Mr. Battle has the result of placing NHG in a far better position financially than it would have been had no breach occurred.

An alternate award of damages for breach would be NHG's reliance interest damages, but the Board finds no basis for an award of damages that would exceed the previous payment of \$427,800 by HUD. The DCAA audit shows that NHG asserted costs in the amount of \$1,646,299, but NHG revised that amount down to \$505,089. DCAA further adjusted NHG's costs down to \$269,307, and the audit noted that NHG was unable to adequately document the costs incurred under contract 376. The DCAA audit also found that NHG lacked an accounting system that would show the different costs for each contract. NHG submitted a schedule of costs, Exhibit 9, that totaled \$1,118,822, but that schedule of costs had no supporting data. Moreover, NHG's schedule of costs asserts an amount that is almost twice as much as its revised summary of \$505,089, which NHG calculated during the audit process. To the extent that the DCAA audit was able to adjust any of NHG's costs under contract 376, that amount, \$269,307, was less than the preliminary settlement of \$427,800. The Board, consequently, finds that the record is insufficient to find any basis for the awarding of reliance damages.

NHG asserts, on the basis of Mr. Battle's report, damages for lost earnings on future contracts in the amount of \$535,520, but a claim for such damages has already been addressed and rejected in this Board's previous decision on HUD's motion for summary relief. In that decision, the Board stated that in order "for a contractor to recover lost profits those losses must flow from the contract the contractor has with the Government, and not from prospective, independent, or collateral undertakings." *National Housing Group*, 09-1 BCA at 168,379 (quoting *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, 07-2 BCA ¶ 33,698, at 166,824). Lost profits on other contracts are "too uncertain, remote, and consequential to be considered as a part of the damages occasioned by the breach of a contract." *Id.* at 168,380. NHG's present claim for reinvestment income is based on only speculation as to other contracts that might have been awarded, and the Board finds those grounds insufficient to support any award of damages. Accordingly, NHG is not entitled to recover damages in any amount based on future profits from other contracts.

NHG argues that the Board should supply missing terms to contract 376 that include a unit count and a minimum holding period. In support of its argument, NHG argues that the Board should apply *Howell v. United States*, 51 Fed. Cl. 516 (2002), to reach such a result. The Board finds *Howell* to be inapplicable in that contract 376 does not need any additional terms to establish minimum quantities. The Board's previous decision rejected NHG's earlier contention that its four contracts with HUD, which included contract 376, were not IDIQ contracts. *National Housing Group*, 09-1 BCA at 168,377. The Board's decision recognized that the number of units in a multifamily property could vary from five or more and that the duration of an assignment of property was variable. *Id.* The parties have not disputed the number of properties that were assigned, and the task of the Board in this appeal has been to determine a reasonable measure of damages. Adding terms to the contract, as suggested by NHG, is not necessary.

Also, NHG has argued in its brief that HUD's extension of contract performance with regard to one property, Waterford Place Apartments, was an exercise of its option under the contract, and that NHG is entitled to breach damages due to HUD's failure to award an additional eleven properties during the first option year. Appellant's Brief at 25. It is "well established that the 'proper scope of an appeal processed under the [Contract Disputes Act] is circumscribed by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom.'" *Guilltone Properties, Inc.*, HUD BCA 02-C-103-C4, 06-1 BCA ¶ 33,249, at 164,786 (quoting *Stencel Aero Engineering Corp.*, ASBCA 28654, 84-1 BCA ¶ 16,951, at 84,315 (1983)). Appellant has neither submitted a claim regarding the extension of performance for Waterford Place Apartments nor has it asserted breach with regard to the first option year of the contract. HUD extended the performance period with regard to Waterford Place Apartments, and the parties executed a bilateral modification. Nothing in the record shows that HUD ever executed any option

under contract 376. Accordingly, the Board does not deem a newly raised claim related to the extension of contract performance for Waterford Place Apartments or the exercise of an option to be part of this appeal.

The CO's decision also determined that the payment of \$427,800 was excessive and demanded that NHG repay \$164,327, but HUD did not assert this claim at the hearing. In its brief, HUD argues that NHG is not entitled to recover any additional damages in excess of the \$427,800 already paid, but HUD does not argue for any reduction of the amount paid. Respondent's Brief at 28. The Board finds no legal basis for allowing HUD to recover \$164,327 or any other portion of the amount paid in the preliminary settlement agreement. The settlement agreement between HUD and NHG was preliminary in that an audit had not yet been conducted, and the terms of the agreement were specific that the amount of the payment of \$427,800 could be modified based upon the audit. The CO's decision, however, did not rely on the results of the audit. Instead, the CO attempted to compute NHG's breach of contract damages by using data from property assignments over a seven year period to compute the management fees that could have been collected if an additional six properties had been assigned. The preliminary settlement agreement did not provide that the payment of \$427,800 could be adjusted for that reason. A spreadsheet attached to the preliminary settlement agreement showed how the \$427,800 payment was calculated, and the Board can only conclude that both parties understood the basis for that payment. For those reasons, the Board finds no basis for modifying the terms of the payment of \$427,800 under the preliminary settlement agreement. Accordingly, HUD is not entitled to recover any portion of the payment previously made.

In conclusion, the Board denies in part and grants in part this appeal. The Board denies NHG's claim for the payment of additional damages in that the previous payment of \$427,800 under the preliminary settlement agreement exceeds any reasonable measure of damages for breach. The Board sustains the appeal to the extent that the HUD is not entitled to recover its claim for payment of \$164,327.

Decision

The appeal is **GRANTED IN PART**. NHG is not entitled to recover any additional amount of damages for breach, and HUD is not entitled to recover any portion of the amount previously paid under the terms of the preliminary settlement agreement.

H. CHUCK KULLBERG
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

CATHERINE B. HYATT
Board Judge